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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
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12 JACKIE RAE RUMMELL,

13 Plaintiff,

14 v.

15 CAROLYN W. COLVIN,
16 Acting Commissioner of the Social
Security Administration,

17 Defendant.
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Case No. CV 15-01341 RAO

**MEMORANDUM OPINION AND
ORDER**

20 **I. SUMMARY OF RULING**
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22 Plaintiff Jackie Rae Rummell (“Plaintiff”) challenges the denial of her
23 application for disability insurance benefits (“DIB”) and Supplemental Security
24 Income (“SSI”). The Administrative Law Judge (“ALJ”) found that Plaintiff could
25 perform past relevant work and therefore, is not disabled. (Administrative Record
26 (“AR”) 24).

27 Plaintiff contends that the ALJ erred in failing to include additional mental
28 impairments in the residual functional capacity (“RFC”) assessment, improperly

1 finding Plaintiff not entirely credible, failing to consult with a vocational expert
2 (“VE”) regarding Plaintiff’s new exertional and non-exertional limitations, and
3 improperly applying res judicata to the prior RFC determination by another ALJ.
4 For the reasons discussed below, this Court finds that Plaintiff’s claim has merit.

5 **II. PLAINTIFF’S CONDITIONS AND PROCEEDINGS BELOW**

6 On March 18, 2008, Plaintiff applied for the first time for DIB and SSI based
7 on a variety of physical ailments. (See AR 90). After an administrative hearing,
8 the ALJ found that Plaintiff’s status epilepticus constituted a “severe impairment”
9 under federal regulations but was not severe enough to medically equal a listing.
10 (AR 92-94). The ALJ also found that Plaintiff’s hypertension constituted a
11 nonsevere impairment. (AR 94). After assigning varying weight to Plaintiff’s
12 treating and examining physicians and taking into consideration the testimony of a
13 VE, the ALJ determined that Plaintiff had the RFC to perform the full range of
14 work at all exertional levels as defined in 20 C.F.R. § 404.1567 with certain
15 limitations. (AR 94-96). Specifically, the ALJ found that Plaintiff had
16 nonexertional limitations precluding climbing ladders and scaffolds, with only
17 occasional climbing of stairs and ramps; postural limitations of occasional
18 balancing, stooping, and crawling; and environmental limitations precluding work
19 at unprotected heights or around dangerous machinery, and concentrated exposure
20 to heat, cold, vibrations, dust, fumes, and pulmonary irritants. (AR 94). Taking
21 into consideration these restrictions and the VE’s testimony, the ALJ determined
22 that Plaintiff was capable of performing past relevant work as a telephone solicitor
23 as it is actually performed. (AR 96). Consequently, the ALJ determined that
24 Plaintiff was not disabled and thus not entitled to benefits. (AR 97).

25 On March 21, 2012, Plaintiff again applied for DIB and on April 12, 2012,
26 for SSI based on a variety of physical and mental ailments. (AR 209-225). After
27 an administrative hearing, the ALJ found that Plaintiff’s status epilepticus and mild
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1 early degenerative osteoarthritis and osteopenia of the left hip constituted “severe
2 impairments” under federal regulations but were not severe enough to medically
3 equal a listing. (AR 19-22). The ALJ also found that Plaintiff’s hypertension,
4 chronic back pain, and memory loss and mental impairments constituted nonsevere
5 impairments. (AR 20-21).

6 Thereafter, the ALJ studied and assigned varying weight to the opinions of
7 examining consultants, treating physicians, and other medical professionals that
8 reviewed Plaintiff’s records. (AR 19-21). Specifically, the ALJ gave great weight
9 to the opinions of two consultative examiners, Dr. Wallack and Dr. Brawer. (AR
10 20-21). The ALJ cited but did not specify weight accorded to the observations of
11 Plaintiff’s treating physician, Dr. Ter-Poghosyan. (AR 20-21). Ultimately, the ALJ
12 found that Plaintiff’s medically determinable impairments could reasonably have
13 been expected to cause her alleged symptoms. (AR 22-24). However, he also
14 found that Plaintiff’s statements regarding the intensity, persistence, and limiting
15 effects of her symptoms were “not entirely credible.”¹ (AR 22-24). As a result, the
16 ALJ determined that Plaintiff had the RFC to perform the full range of medium
17 work, as defined 20 C.F.R. § 404.1567(c), with the same nonexertional, postural,
18 and environmental limitations determined by the prior ALJ’s decision. (AR 24).
19 Specifically, the ALJ determined that Plaintiff’s new hip and mental impairments
20 were not “material changes” since the last ALJ’s RFC assessment, and accordingly
21 adopted the prior assessment. (AR 24). Consequently, the ALJ determined that
22 Plaintiff could perform past relevant work as a telephone solicitor, was not
23 disabled, and not entitled to benefits. (AR 24-25).

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26 ¹ When making the credibility finding, the ALJ pointed to the lack of objective
27 medical evidence corroborating Plaintiff’s complaints, Plaintiff’s failure to pursue
28 medical treatment for her alleged impairments, and her activities of daily living
inconsistent with disabling impairments. (AR 23).

1 **III. ISSUE PRESENTED**

2 Whether the ALJ's determination that Plaintiff could perform past relevant
3 work as a telephone solicitor is supported by substantial evidence in the record.
4 (Plaintiff's Memorandum in Support of Complaint ("Pl.'s Compl.") at 3).

5 **IV. STANDARD OF REVIEW**

6 Under 42 U.S.C. § 405(g), a district court may review the Commissioner's
7 decision to deny benefits. A court must affirm an ALJ's findings of fact if they are
8 supported by substantial evidence and if the proper legal standard was applied.
9 Mayes v. Massanari, 276 F.3d 453, 458-59 (9th Cir. 2001). Substantial evidence is
10 more than a mere scintilla but less than a preponderance. Id. at 459. Substantial
11 evidence is "relevant evidence which a reasonable person might accept as adequate
12 to support a conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998)
13 (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). To determine
14 whether substantial evidence supports a finding, a court must "consider the record
15 as a whole, weighing both evidence that supports and detracts from the [ALJ's]
16 conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting
17 Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)).

18 A court must uphold the ALJ's conclusion even if the evidence in the record
19 is susceptible to more than one rational interpretation. Morgan v. Comm'r of Soc.
20 Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999) (citing Andrews v. Shalala, 53 F.3d
21 1035, 1040-41 (9th Cir. 1995)); see Mayes, 276 F.3d at 459. If the evidence can
22 reasonably support either affirming or reversing the ALJ's decision, "the court may
23 not substitute its judgment for that of the ALJ." Aukland, 257 F.3d at 1035
24 (citation omitted). The court has the authority to affirm, modify, or reverse the
25 ALJ's decision "with or without remanding the cause for rehearing." 42 U.S.C.
26 § 405(g). Remand is appropriate where additional proceedings would remedy the

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1 defects in the ALJ's decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.
2 1989).

3 **V. DISCUSSION**

4 **A. Pertinent Law**

5 The Social Security statute and implementing regulations establish a five-
6 step sequential process to evaluate disability claims. 20 C.F.R. § 404.1520 (a)-(f);
7 Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999). At step four, the inquiry
8 is whether the claimant can perform past relevant work "either as actually
9 performed or as generally performed in the national economy." Carmickle v.
10 Comm'r of Soc. Sec. Admin., 533 F.3d 1155, 1166 (9th Cir. 2008). The testimony
11 of a VE is often critical to the ALJ in making this determination. See 20 C.F.R.
12 § 404.1560(b)(2).

13 The claimant has the burden to show that she cannot perform her past
14 relevant work. Pinto v. Massanari, 249 F.3d 840, 844 (9th Cir. 2001). However,
15 the ALJ "has a duty to make the requisite factual findings to support his
16 conclusion." Id.; Carmickle, 533 F.3d at 1166. An ALJ's determination that the
17 claimant has the RFC to perform her past relevant work must contain a finding of
18 fact that the individual's RFC would permit a return to the position. Social Security
19 Ruling 82-62, 1982 WL 31386, at *4; see 20 C.F.R. § 404.1520(f).

20 The ALJ first assesses a claimant's RFC, defined as the most that a claimant
21 can do despite physical and mental limitations caused by his impairments and
22 related symptoms. 20 C.F.R. § 416.945. The ALJ is "required to consider all of the
23 limitations imposed by the claimant's impairments, even those that are not severe."
24 Carmickle, 533 F.3d at 1164. As with the other steps of the sequential analysis, the
25 ALJ properly considers the medical opinions of the claimant's treating physicians,
26 examining physicians, and non-examining physicians. Generally, the greatest
27 weight is accorded to the claimant's treating physician, because the treating
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1 physician has the most contact and a better opportunity to know and observe the
 2 claimant as an individual. Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003).
 3 “[I]f the treating doctor's opinion is contradicted by another doctor, the
 4 Commissioner may not reject this opinion without providing ‘specific and
 5 legitimate’ reasons supported by substantial evidence in the record for so doing.”
 6 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (quoting Murray v. Heckler, 722
 7 F.2d 499, 502 (9th Cir. 1983)).

8 “The principles of res judicata apply to administrative decisions, although the
 9 doctrine is applied less rigidly to administrative proceedings than to judicial
 10 proceedings.” Chavez v. Bowen, 844 F.2d 691, 693 (9th Cir. 1988). Accordingly,
 11 a prior ALJ’s finding that a claimant is not disabled creates a presumption that the
 12 claimant continued to be able to work after that date. Vasquez v. Astrue, 572 F.3d
 13 586, 597 (9th Cir. 2009). “The presumption does not apply, however, if there are
 14 ‘changed circumstances.’” Lester, 81 F.3d at 827 (quoting Taylor v. Heckler, 765
 15 F.2d 872, 875 (9th Cir. 1985)); Social Security Acquiescence Ruling (“SSAR”) 97-
 16 4(9), 1997 WL 742758, at *3. Changed circumstances include when “the claimant
 17 raises a new issue, such as the existence of an impairment not considered in the
 18 previous application.” Lester, 81 F.3d at 827-28; SSAR 97-4(9), 1997 WL 742758,
 19 at *3. “Acquiescence Ruling 97-4(9) requires only a ‘changed circumstance
 20 affecting the issue of disability,’ not necessarily a severe impairment.” Gregg v.
 21 Colvin, 2013 WL 2423132, at *5 (C.D. Cal. June 4, 2013) (internal quotation
 22 marks omitted). Even when changed circumstances are shown, the prior ALJ’s
 23 findings “concerning the claimant’s residual functioning capacity, education, and
 24 work are entitled to some res judicata consideration in subsequent proceedings.”
 25 Chavez, 844 F.2d at 694.

26 **B. Analysis**

27 Consistent with Chavez and the Social Security Administration’s
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1 Acquiescence Ruling 97-4(9), the ALJ addressed whether Plaintiff had shown
2 “changed circumstances” sufficient to rebut the presumption of continuing non-
3 disability. Plaintiff contends that the ALJ’s determination that her new
4 impairments do not constitute “changed circumstances” is not supported by
5 substantial evidence in the record. (Pl.’s Compl. at 3-12). It is not supported,
6 Plaintiff argues, because the ALJ failed to properly consider her new physical and
7 mental limitations and did not take the testimony of a vocational expert regarding
8 these new limitations in determining her RFC. (*Id.*) The Court agrees.²

9 Here, the ALJ found that Plaintiff’s new hip impairment, mental
10 impairments, and memory loss were not “material changes” that would alter the
11 overall conclusion that Plaintiff was able to perform her past relevant work as a
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13 ² Plaintiff also argues that the ALJ’s credibility assessment of Plaintiff was not
14 supported by substantial evidence. (Pl.’s Compl. at 5). However, the ALJ
15 specifically articulated the reasons for his adverse credibility determination,
16 including the lack of objective medical evidence corroborating Plaintiff’s
17 complaints, Plaintiff’s failure to pursue medical treatment for her alleged
18 impairments, and her activities of daily living inconsistent with disabling
19 impairments. (AR 23). These are legitimate factors that support the ALJ’s
20 credibility determination. See *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
21 1996). Moreover, the ALJ at the prior hearing also found Plaintiff to be “not
22 entirely credible” in regards to her testimony about the extent and severity of her
23 impairments. (AR 95-96). Because the ALJ made specific findings stating clear
24 reasons for his determination, the Court “may not second-guess it.” *Rodriguez v.*
25 *Astrue*, 279 Fed. App’x 512, 513 (9th Cir. 2008). However, to the extent that the
26 ALJ based his adverse credibility determination on the “minimal objective medical
27 findings” supporting Plaintiff’s complaints, the Court notes that the ALJ repeatedly
28 cites the treatment records of Dr. Ter-Poghosyan without specifying weight
assigned to those opinions. (AR 20-21). These records show that Plaintiff
consistently complained of hip pain during at least three examinations over the
course of seven months, all occurring after the first ALJ decision, resulting in at
least two referrals to orthopedics for follow up. (AR 807-808, 811, 824-825, 834,
854). To the extent the observations contained in these reports tend to corroborate
Plaintiff’s subjective complaints, they should be properly weighted and taken into
consideration on remand.

1 telephone solicitor and adopted the RFC assessment of the prior ALJ. (AR 23-24).
2 In making this determination, the ALJ took into account Plaintiff's testimony and
3 the medical opinions of two consultative examiners, Dr. Wallack and Dr. Brawer.
4 (AR 23-24). In regards to Plaintiff's hip pain, the ALJ noted that Dr. Wallack
5 opined that Plaintiff could "lift/carry up to 50 pounds occasionally and 25 pounds
6 frequently, stand/walk for up to 6 hours in an 8-hour workday, unrestricted sitting,
7 and occasional postural activities." (AR 23). This corresponds to "medium work,"
8 as defined in the Dictionary of Occupational Titles ("DOT"). See Appendix C,
9 Physical Demands, Selected Characteristics of Occupations Defined in the Revised
10 Dictionary of Occupational Titles. The ALJ recognized that "this is somewhat
11 more restrictive in terms of lifting/carrying than the previously assessed residual
12 functional capacity," but:

13 [s]ince the more restrictive lifting/carrying assessment would not
14 preclude performance of the claimant's past relevant sedentary work, I
15 find that this change is not "material" to the conclusion that the
16 claimant continues to be "not disabled" as defined by the Social
17 Security law, and I continue to adopt the residual functional capacity
18 set forth within the previous Administrative Law Judge decision as
19 claimant's current residual functional capacity.

20 (AR 23). The previously assessed residual functional capacity found Plaintiff able
21 to perform work at all exertional levels, but Plaintiff's new hip impairment limited
22 her to a maximum exertional level of medium work. Therefore, it is technically
23 erroneous for the ALJ to apply res judicata wholesale to the previous exertional
24 limitations in the prior ALJ's RFC assessment because the more restrictive
25 exertional limitations resulting from Plaintiff's hip impairment is a "changed
26 circumstance." See Schreier v. Astrue, 2009 WL 4757242, at *4 (D. Nev. Dec. 10,
27 2009) (plaintiff had rebutted presumption of continuing nondisability by submitting
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1 additional medical records establishing the existence of a new severe impairment,
 2 so ALJ properly “continued his analysis to determine whether plaintiff presented
 3 new and material evidence related to the ALJ’s 2003 findings regarding her RFC”).
 4 However, this error is harmless because reference to the DOT shows that the
 5 limitation to medium exertional work does not preclude performance of Plaintiff’s
 6 past relevant work as a telephone solicitor, which is sedentary.³ See 20 C.F.R.
 7 § 404.1566(d)(1) (requiring ALJ to take notice of DOT classifications).

8 In regards to Plaintiff’s new mental impairments, the ALJ accorded great
 9 weight to the opinion of Dr. Brawer, who determined that Plaintiff’s depression and
 10 memory impairments would cause “mild limitations in her ability to manage
 11 customary work stress and persist throughout a regular workday,” “mildly
 12 diminish” her “ability to sustain attention and concentration for extended periods,”
 13 and limit her ability to perform the full range of detailed, varied, and complex tasks.
 14 (AR 21, 768, 722). Although stemming from nonsevere impairments, these new
 15 functional limitations were not accounted for in the prior RFC assessment and
 16 therefore constitute “changed circumstances.” SSAR 97-4(9), 1997 WL 742758, at
 17 *3 (a “changed circumstance” includes “the alleged existence of a new
 18 impairment(s) not previously considered” that “affect[s] the issue of disability”).
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20 ³ The DOT addresses all of the new exertional limitations found by Dr. Wallack.
 21 Specifically, the DOT states that the exertional level required to perform work as a
 telephone solicitor includes:

22 Exerting up to 10 pounds of force occasionally (Occasionally: activity
 23 or condition exists up to 1/3 of the time) and/or a negligible amount of
 24 force frequently (Frequently: activity or condition exists from 1/3 to
 25 2/3 of the time) to lift, carry, push, pull, or otherwise move objects,
 including the human body. Sedentary work involves sitting most of the
 26 time, but may involve walking or standing for brief periods of time.
 27 Jobs are sedentary if walking and standing are required only
 occasionally and all other sedentary criteria are met.

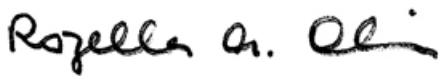
28 DOT 299.357-014, Telephone Solicitor (Miscellaneous Sales Occupations).

1 The hypothetical presented to the VE at the prior hearing did not include
 2 these functional limitations. (AR 43, 54-55). The DOT entry for telephone
 3 solicitor does not specifically address these types of limitations. See DOT 299.357-
 4 014, Telephone Solicitor (Miscellaneous Sales Occupations). Therefore, the ALJ
 5 should have taken the testimony of a VE to determine whether these new functional
 6 limitations would preclude performance of Plaintiff's past relevant work as a
 7 telephone solicitor. See Gregg, 2013 WL 2423132, at *5-6 (additional VE
 8 testimony required because hypothetical at prior hearing did not take into account
 9 the environmental limitations resulting from plaintiff's new impairment); see also
 10 Schreier, 2009 WL 4757242, at *5 (additional VE testimony not required because
 11 hypothetical at prior hearing took into account the functional limitation resulting
 12 from plaintiff's new impairment). This error is not harmless because there is no VE
 13 testimony or reference to the DOT to support a finding that Plaintiff could perform
 14 her past relevant work as a telephone solicitor if the new functional limitations
 15 opined by Dr. Brawer were incorporated into Plaintiff's RFC. See Gregg, 2013 WL
 16 2423132, at *5. Accordingly, the ALJ's determination that the Plaintiff is not
 17 disabled is not supported by substantial evidence.

18 **VI. CONCLUSION**

19 For the foregoing reasons, the decision of the Commissioner that Plaintiff is
 20 not disabled and therefore is not entitled to benefits is REVERSED and this action
 21 is REMANDED for further proceedings in accordance with this decision.

22
 23 DATED: October 7, 2015

23 
 24 HON. ROZELLA A. OLIVER
 25 UNITED STATES MAGISTRATE JUDGE

26 **NOTICE**

27 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN**
 28 **LEXIS/NEXIS, WESTLAW OR ANY OTHER LEGAL DATABASE.**